April 25, 2004

Michigan Supreme Court

P.O. Box 30052

Lansing, Michigan 48909

Re: Proposed Changes To MCR 6.500

Dear Clerk,

Enclosed are my objections to the changes proposed for MCR 6.500. Please submit them to the Court. For the record: I oppose the changes to MCR 6.500. Thank you.

Respectfully submitted,

Darry X Conic

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S T A T E O F M I C H I G A N

M I C H I G A N S U P R E M E C O U R T

OBJECTIONS TO THE PROPOSED CHANGES TO MCR 6.500

BY LARRY X CONIC

April 25, 2004

C O N T E N T S

P R O C E D U R E O V E R S U B S T A N C E

By raising the "procedural" barriers this Court would prevent "substantive" reviews that are required by the United States Supreme Court. The ultimate effect of the proposed changes to MCR 6.508 is to specifically undermine the following United States Supreme Court precedents.

Bunkley v Florida 123 S.Ct 2020 (2003)

Bunkley says collateral review is required when a defendant shows he was convicted under an interpretation that was later overturned "and" that an element of the crime cannot be found by using the correct interpretation. This proposal would force a defendant to make a separate showing that the violation also offended the integrity of the judicial system on top of the Bunkley requirements. That extension violates Bunkley.

Underlying Bunkley is Jackson v Virginia 443 US 307. If an element of the offense cannot be met with the correct interpretation Jackson says the Fourteenth Amendment has been violated. The underlying Jackson claims are immune from further inquires.

If a defendant cannot make the extra judicial integrity showing he can only get his Bunkley entitlements if the reversed interpretation was given retroactive application on collateral appeal. But Bunkley rejected the retroactivity requirement.

Retroactivity applies only if a state has created "new" law. When a state "clarifies" an interpretation of its statute it hasn't created new law, just cleared up an old one. Neither retroactivity, law-of-the-case, nor procedural time limits bar Bunkley's review, see id 2021-23. Tacking these barriers on as "procedural" rather than "substantive" will not cure the offense to Bunkley.

The extra hurdles effectively inserts barriers Bunkley rejected, to avoid a review which Bunkley demands. Its an end-run around Bunkley and Fiore v White 531 US 225 (2001).

In the last 5 years this court has had 22 major changes to its jurisprudence which triggers Bunkley. This proposal is aimed at stripping defendant's of their Bunkley entitlements by imposing outlawed barriers through the State's procedural powers. If this proposal passes it would require an extra showing that a Bunkley-tye error was made retroactive, or that it offended the integrity of the judicial system. Neither prong is applies to a Bunkley showing.

Furthermore, the judicial integrity language -- which was adopted from United States v Olano 507 US 725 -- functions as a harmless error test that is barred from most constitutional claims. It applies only "after" a defendant has shown constitutional error affected his substantial rights. This attachment would have to apply to claims like ineffective assistance, and that's a No-No.

Massaro v United States 123 S.Ct 1690 (2003)

Massaro recently held that challenges against trial counsel could be brought on collateral appeal. This proposal would extend the ineffective assistance requirements by adding 'judicial integrity' on top of that showing. Williams v Taylor 529 US 365 rejected such extensions on ineffective assistance of counsel.

The Williams Court looked at a Virginia decision that extended the prejudice inquiry for ineffective assistance. The way Virginia saw it, Lockhart v Fretwell 506 US 364 had added an extra layer of prejudice on top of the normal ineffective assistance test. The

Williams Court disagreed ("The Virginia Supreme Court erred in holding that our decision in Lockhart ... modified or in some way supplanted the rule set" for ineffective assistance).

According to Justice Stevens, Virginia read the decision in Lockhart "to require a separate inquiry into fundamental fairness" even when Williams was able to meet the ineffectiveness test.

"Take, for example, our decision in Strickland v Washington 466 US 668," explained Justice O'Connor.

"If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by **a preponderance of the evidence** that the result of his criminal proceeding would have been different, that decision would be (contrary) to our clearly established precedent because we held in Strickland that the prisoner need only demonstrate a **reasonable probability...**" Williams, at 407 (emphasis added).

In Williams, Virginia added Lockhart on top of Strickland. Now, Michigan is being asked to add Olano. Same result: It would require the defendant to demonstrate more than a probability of harm by requiring that counsel's errors <u>also</u> affected the integrity of the judicial system. Under Strickland a reasonable probability is enough to show fundamental fairness was violated, Williams id.

The judicial integrity showing is much more than a reasonable probability. Hence it extends the requirements for prejudice, and directly contradicts Williams v Taylor. Yes! That's exactly what this proposal would do: It would require a defendant to make the Olano showing "after" displaying a reasonable probability of prejudice.

The proposal is asking this court to impose an extended test on the substance of an issue by re-labeling its extension as "procedural" rather than "substantive." That won't cut it.

Schlup v Delo, 513 US 298

The proposal also requires defendants to show errors by 'clear and convincing' evidence. That standard was rejected in Schlup v Delo. There the defendant filed his second habeas petition and the question was how much actual innocence he had to show to pass the threshold back into court: Was it by clear and convincing evidence (Sawyer v Whitley 505 US 333), or a miscarriage of justice (Murray v Carrier 477 US 478).

"[W]e conclude that in a case such as this, the Sawyer, standard does not apply" @ 324. The Court denounced Sawyer as being far too high for threshold matters. Carrier seeks to balance society's interests in finality, comity and conserving judicial resources with the individual interest in justice. "We conclude that Carrier, rather than Sawyer, properly strikes that balance," id.

"Accordingly, we hold that the Carrier 'probably resulted' standard rather than the more stringent Sawyer Standard must govern the miscarriage of justice inquiry when a petitioner ... raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims." id 327.

It's true that Carrier standard imposes a lower burden of proof, but that's exactly why the Schlup Court adopted it: Carrier properly strikes the balance between the interests of the State and the interests of the individual, id. 324. Its important to note, Schlup filed a successive petition with all its built-in barriers to that type of review.

This proposal is asking the Court to use clear & convincing as the gateway when the Schlup Court denounced it. To place that burden on state prisoners when the Schlup said not to. And to do it on prisoner's first collateral appeal, when Schlup rejected it even for successive (second) appeals.

In effect, the proposal is asking this Court to overturn the United States Supreme Court's decision in Schlup v Delo. At minimum, the proposal asks the Court to use its procedural powers to violate Schlup by raising the threshold requirements to clear & convincing, far beyond what the Supreme Court allows, cf Schlup 529-30. That can't be done unless the State breaks with all federal parameters set for state collateral appeals.

By imposing a higher burden than the US Supreme Court, the artificially inflated state barrier would gain improper deference later on federal habeas. Ironically, it will do so by contradicting the very US Supreme Court precedent governing that review.

Raising the "procedures" would extend requirements for the substance: Where Murray says a showing of ineffective assistance is enough to undermine finality, this proposal would require an additional showing of judicial integrity. That component would also be added to a claim of insufficient evidence born from a Bunkley error. And a defendant making an actual innocence showing would have to do so by clear & convincing evidence.

The Supreme Court rejected each barrier requested by this proposal. So, the proposal asks that the rejected barriers be labeled "procedural" as opposed to substantive. By overlaying the these procedural barriers 6.500 review could add the restrictive barriers the Supreme Court rejected.

In each case the proposal would raise the US Supreme Court requirements beyond the controlling cases in that field. The effect is to avoid ruling on federal questions in state court even when that review is required in state collateral appeals. It would ignore

claims of actual innocence required by Schlup, ineffective assistance required by Massaro, & misinterpretations of state statute required by Bunkley.

Such a procedure would ultimately have a blow-back effect for 6.500 denials when they reach federal habeas. Without a state court adjudication on the federal issues a habeas court has no basis for review, so the Sixth Circuit ordered habeas court to return to pre-AEDPA law, Maples v Stegall 340 F.3d 433 (6 Cir 2003). Under the Maples approach 6.500 decisions would lose the implicit AEDPA deference that supports most 6.500 denials, and increase federal reversals of state collateral appeals.

The Supreme Court recently cleared this up in Wiggins v Smith 123 S.Ct 2527 (2003) which shows the Sixth Circuit was right in McKenzie v Smith 326 F.3d 721 (6 Cir 2003) (when State fails or refuses to adjudicate properly presented federal claims, AEDPA deference does not apply -- and properly presented is determined by federal standards, not state see Maples).

O N E Y E A R T I M E L I M I T

Lawyers cannot obtain a medical license in one year, and judges cannot learn complex neurosurgery in that time. Pro se prisoners will not be able to learn complicated controlling authorities for state "and" federal courts in time to make an informed choice about which way to go, 6.500 or federal habeas. A 6.500 timelimit would require that prisoners learn the substantive and procedural requirements for both state & federal forums. Impossible!

The federal one year requirement is enough. Defendants can go to the federal forum with issues raised by appellate counsel

on direct appeal -- those issues have the 'professional' eye envisioned by Evitts v Lucey 469 US 387. If unsuccessful in federal habeas the 6.500 process remains open to catch any further developments in the law, which just happens to comply with Bunkley.

Say, a defendant lost a Confrontation claim on direct appeal. After the habeas timelimit has expired the US Supreme Court decides Crawford v Washington (Mar. 12, 2004, S.Ct #02-9410). Under the proposed changes that defendant has no place to go with obvious Confrontation violations recently made clear by the US Supreme Court.

His only error is the state court's misinterpretation of the Confrontation Clause which was in turn born from prior decisions of state and federal courts. Imposing a one year time limit on this defendant effectively bars review of constitutional violations through no fault of the defendant, and does an end run around Crawford.

M A N I P U L A T I N G A E D P A D E F E R E N C E

By circumventing Crawford, Bunkley, Massaro, and the Wiggins rationale the proposal would relegate those errors to state review, then raise the threshold requirements above what the Supreme Court requires. And do so under the surreptitious tactic of labeling the restrictions "procedural" instead of "substantive."

Returning to Massaro for a minute, if a challenge to trial counsel is rejected for failing to meet the Olano test, this would clearly contradict the Supreme Court's decision in Williams v Taylor (state cannot extend the ineffective inquiry, Williams, 406)

But because there is no state court adjudication on the merits both the error itself and the state's artificially high barriers would be foreclosed from federal habeas review -- especially if

the federal one year time limit has expired. The federal court will be asked to defer to a state court test that extended every Supreme Court guideline governing procedural requirements (e.g. Schlup).

Moreover, say trial counsel fails to object to the admission of illegal evidence. Failing to make the showing by clear and convincing evidence would bar the claim from review on 6.500. Not only is the clear and convincing logic barred from threshold challenges of ineffective assistance (Williams, id) but Massaro requires that the claim be reviewed on state collateral appeal. Notwithstanding procedure.

Because ineffective assistance claims are too underdeveloped at direct appeal, the Massaro Court held state procedural rules do not bar collateral review of this claim. While Massaro subordinates procedural rules to substantive review this proposal does the reverse, subordinates review to the rule. Diametrically opposite? Yes. It is also mutually opposed and substantially different from Massaro. In Justice O'Connor's words, it would be "Contrary to," see §2254(d).

25 PAGE LIMIT

Undereducated prisoner pro se pleadings are "inartful" to say the least. Add to that a $300 price tag for a typewriter this court forced on prisoners by prematurely closing Cain v MDOC. What you have left are desperate prisoners handwriting their 6.500 motions to comply with the one year time limit. *

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* Prisoners only make .17¢ an hour. At that rate it'll take 15 months to save $300 for a typewriter. Prisoners can't save that before the 12 month 6.500 timelimit, nor the time it takes to go through direct (state) or federal habeas appeals -- they do have to buy soap, deodorant, etc. Plus saving $300 triggers the state appellate court's filing fee requirements ($375).

Prisoners are only allowed 6 hours of Law Library time per week. With a one year cap, there will be a 1200-prisoner rush for 6 institutional typewriters to get the motions in on time. It's either that or handwrite the motions, which will surely cause some constitutional claims to be left out because of the page limit. If a claim is left out on 6.500, it'll be left out on federal habeas (exhaustion doctrine).

Imagine that Confrontation claim again, Crawford v Washington. Although the US Supreme Court clarified the erroneous Confrontation analysis, a defendant would be precluded from filing that claim on federal habeas or 6.500.

Without a 6.500 procedure to turn to the issue cannot be exhausted. The inartful pro se prisoner has to also squeeze his ineffective assistance claim in, and get to an institutional typewriter. If his timing is off by a hair he'll have to handwrite both issues. One won't make it and "I couldn't fit within the state page limit" won't excuse the exhaustion violation.

State procedure won't take the issue in either: it's not a retroactive change in Confrontation analysis, it's past the one year 6.500 timelimit, and would require a second 6.500 motion -- something not included in the proposed changes.

A simple page limit works to effectively preclude review of a constitutional claim that has been defined by the US Supreme Court "after" the defendant's one year has expired. The AEDPA is forcing state courts to make more rulings clarifying its procedural interests. These proposals pits MCR 6.508(D) against, Bunkley, Massaro, Schlup, and future decisions clarifying state prisoner entitlements not known at this date.

S E N T E N C I N G Q U E S T I O N S

Prisoners can't appeal parole denials based on false or inaccurate information, many prisoners employ the 6.500 procedure to clarify sentencing information relied upon by the parole board. These proposals make no allowance for clarifying sentencing defects. Constitutional claims would effectively get smothers under layers of far-fetched procedural restrictions that have no relationship with the claims it bars.

A number of complications arise from adopting the changes proposed here, and these are only a few. I appose "all" the changes to the 6.500 rules, especially those making it tigther to get a first 6.500 review and eliminating the possibility of the already limited successive review. Defendant's would be barred from judicial protections even after a statute has been clarified in the defendant's favor (highlighting the erroneous interpretation, as in People v Randolph 466 Mich 532). The State would return back to an airtight system of forfeitures to deny collateral appeal, and ultimately cripple federal habeas review. The issues mentioned here are just a "few" of the complications sure to arise by adopting the changes described. If this court eviscerates State collateral appeals by making hurdles insurmountable for the pro se prisoner, it should not be surprised at the turmoil it creates by that desperation.

People want fairness. This creates gladiators (men fighting legal lions). The State already has too much power with respect to collateral appeals. Prisoners are crippled by the FOIA restrictions precluding access to documents necessary to meet

constitutional tests issued by teh US Supreme Court. Now the proposal increases the requirements and still precludes access to the material needed to make the showing.

Can't have it both ways. If the State has access to police reports, computers, and other documents to hide constitutional violations do not heap extra requirements on top of the preclusive FOIA restrictions to prevent prisoners from showing how constitutional violations claims deprived them of a fair trial. These proposals are bogus. They're aimed at undermining decisions of the US Supreme Court giving prisoners more entitlements to relief and substantive review.

I'm asking the Court to reject the proposed changes to the 6.500 rules in total. Thank you.

Respectfully submitted,

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